BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

U.S. - U.K. ALLIANCE CASE	)	**Docket OST-2001-11029**

CONSOLIDATED JOINT REPLY TO ANSWERS TO MOTION FOR AN ORAL EVIDENTIARY HEARING BEFORE AN ADMINISTRATIVE LAW JUDGE

November 30, 2001

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Delta Air Lines, Inc., Northwest Airlines, Inc., and Continental Airlines, Inc. (collectively, the "Petitioners") hereby request leave to file this consolidated reply to the answers of American/British Airways and United/bmi in the captioned proceeding. Acceptance of this reply will provide a more full and complete record for the Department's determination of what hearing procedures are necessary in this case.

1. For the reasons explained in the Joint Motion, an oral evidentiary hearing is essential to develop, evaluate and resolve the substantial issues of disputed material fact entailed by this extraordinarily complex case. The answers submitted in response to the Joint Motion fail to refute this inevitable conclusion. Neither American/British Airways nor United/bmi dispute that numerous factual issues are highly controverted and that

significant discrepancies exist in the documentary evidence. Nor have the alliance applicants offered an explanation of why the Department's reasons for previously determining to hold an oral hearing to consider London Heathrow alliance issues do not also apply to this case. Instead, the alliance proponents have thrown up a few hollow procedural arguments and urged the Department to side-step the vital hearing process in the interest of expedience. Given the extraordinarily high public interest stakes involved, the Department should give this case the full and careful consideration it deserves.

2. Contrary to the opponents' objections, the hearing motion is timely and appropriate. First, the procedural objections to the Joint Motion are a moot point, since the comment period on both applications remains open under the terms of Order 2001-11-10 (setting a comment date of December 11, 2001, and a reply date of December 18); *see also*, 14 C.F.R. 303.42(a). Second, the full extent of discord in the AA/BA case was not known prior to the filing of answers and replies – facts which the Joint Motion brought into sharp focus to assist the Department's determination of whether and what type hearing to hold. As correctly noted by American and British Airways, the determination of what hearing procedures to employ is ultimately one for the Department itself to make and is not dependent on a motion by any party. *See*, AA/BA Answer at 5; 14 C.F.R. § 303.45(a).

3. American and British Airways recite other prior antitrust immunity decisions for the proposition that a hearing is not necessary in this case. However, for the reasons explained by the Department in Order 97-9-4, those other alliance decisions are

inapposite due to the "unprecedented" London Heathrow access issues and the "enormous degree of regulatory complexity" involved in this case. In attempting to deflect the need for a hearing, American and British Airways baldly assert that "the present proceeding is far different from the prior one." (AA/BA answer at 4). However, that very issue is the subject of major controversy. The Petitioners have submitted substantial evidence showing that no changes have alleviated the harmful competitive consequence of the alliance, and that, if anything, the competitive situation has gotten worse, not better. The applicants dispute that evidence. As detailed in the Joint Motion, these are exactly the sort of disputed factual issues that an oral evidentiary hearing is necessary to resolve.

4. Having determined that an oral hearing was necessary the last time this "unprecedented" and "extraordinary complex" alliance was considered, it would be arbitrary and capricious for the Department to afford any less deliberative process here. While the Joint Applicants have failed to show that the need for a hearing is less, the Petitioners have demonstrated why the opportunity for cross examination before an Administrative Law Judge is essential to get to the bottom of the disputed facts and conflicting evidence -- which is even more controverted and complex than before.

5. By Order 2001-11-10, the Department made the appropriate determination to consolidate the American/British Airways and United/bmi applications, which involve a number of interrelated competition and Heathrow access issues. This obviates the need for a separate parallel hearing procedure on United/bmi. However, in their answer,

United/bmi erroneously assert that "nowhere in their Motion do the Joint Movants cite any need for such a hearing regarding the application of United, bmi and their European partners." UA/bmi answer at 2. To the contrary, the Joint Motion contains an entire section devoted to the "effect of the United/bmi alliance." *See*, Joint Motion at 16-17. For the reasons explained therein, a hearing on the interrelated competition impacts of both Heathrow alliances is essential.

6. It is ironic that United would dismiss the need for a hearing, urging that the Department rush headlong toward "the goal of achieving open skies with the U.K. . . ." UA/bmi at 6. Prior to having its vision clouded by the prospect of its own alliance at the tightly restricted London Heathrow gateway, United correctly determined that a full evidentiary hearing was necessary to investigate the complex Heathrow access and competition problems entailed by an antitrust immunized alliance operating at that airport. United urged that:

> "a formal investigation is needed to resolve the many issues relating to the impact of the proposed alliance on competition. . . . it is widely agreed that other carriers will need access to Heathrow airport. An 'open skies' agreement does not directly address such airport access issues. . . .the U.S. must conduct its own thorough investigation of the factual issues relating to the competitive impact [of] the [Heathrow] alliance[s] . . ."
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> "the most effective way to reach a balanced and well-founded decision is to set down a fact-finding hearing before an Administrative Law Judge."
>
> Motion of United Air Lines for Evidentiary Hearing, Docket OST-97-2058.

United had it right the first time. A full oral hearing and investigative process is critical. Open skies without meaningful Heathrow access is now no more an option "well worth pursuing" than it was in the prior case. UA Answer at 6.

7. Contrary to the objecting answers, the Petitioners do not favor delay. The Department should institute the necessary hearing procedures as quickly as possible, so that a full and complete record can be developed for a timely decision. The Department should not be swayed into short-circuiting its own statutory public interest obligations based on the Joint Applicants' calls for expedience over probative and meaningful substantive evaluation.

WHEREFORE, the Petitioners urge the Department promptly to institute an oral evidentiary hearing before an Administrative Law Judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Reply has been served this 30th day of November 2001, upon each of the following persons in accordance with the Department's rules.

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